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05 UNITED STATES DISTRICT COURT  
06 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

07 JOSEPH D'ATTILI, )  
08 Plaintiff, ) CASE NO. C13-2106-RAJ-MAT  
09 v. )  
10 CAROLYN W. COLVIN, Acting ) REPORT AND RECOMMENDATION  
Commissioner of Social Security, ) RE: SOCIAL SECURITY DISABILITY  
11 Defendant. ) APPEAL  
12 \_\_\_\_\_ )

13 Plaintiff Joseph D'Attili proceeds through counsel in his appeal of a final decision of the  
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner  
15 denied plaintiff's application for Supplemental Security Income (SSI) after a hearing before an  
16 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative  
17 record (AR), and all memoranda, the Court recommends this matter be REMANDED for  
18 further administrative proceedings.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1965.<sup>1</sup> He has a college degree in theater arts, and  
21 \_\_\_\_\_

22 <sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 previously worked in general merchandise sales, as a cashier, and as a retail manager. (AR  
02 28-31, 45.)

03 Plaintiff protectively applied for SSI in April 2011, alleging disability beginning  
04 January 1, 2008. (AR 152-60.) His application was denied initially and on reconsideration,  
05 and he timely requested a hearing.

06 On July 25, 2012, ALJ M.J. Adams held a hearing, taking testimony from plaintiff and a  
07 vocational expert (VE). (AR 25-49.) On September 10, 2012, the ALJ issued a decision  
08 finding plaintiff not disabled. (AR 9-20.)

09 Plaintiff timely appealed. The Appeals Council denied review on September 20, 2013  
10 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff  
11 appealed this final decision of the Commissioner to this Court.

### 12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

### 14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining  
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
17 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had  
18 not engaged in substantial gainful activity since the April 27, 2011 application date. *See* 20  
19 C.F.R. § 416.335 (SSI "is not payable prior to the month following the month in which the  
20 application was filed"). At step two, it must be determined whether a claimant suffers from a  
21 severe impairment. The ALJ found plaintiff's affective disorder and anxiety disorder severe.

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Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ  
02 found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

03 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
04 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
05 demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC  
06 to perform the full range of work at all exertional levels, but with nonexertional limitations.  
07 He concluded plaintiff could perform adequately the mental activities generally required by  
08 competitive, remunerative work as follows: he can understand, remember, and carry out  
09 simple instructions required of jobs at a level of SVP 1 and SVP 2, or unskilled work; he would  
10 have average ability to perform sustained work activities, that is, he can maintain attention and  
11 concentration, persistence, and pace in an ordinary work setting on a regular and continuing  
12 basis for eight hours a day, five days a week, or equivalent work schedule within customary  
13 tolerances of employer's rules regarding sick leave and absence; he can make judgments on  
14 simple work-related decisions and can respond appropriately to supervision and coworkers, and  
15 deal with changes all within a stable work environment; and he is limited to occasional  
16 interaction with the general public. With this RFC, the ALJ found plaintiff unable to perform  
17 past relevant work.

18 If a claimant demonstrates an inability to perform past relevant work or has no past  
19 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the  
20 claimant retains the capacity to make an adjustment to work that exists in significant levels in  
21 the national economy. The ALJ concluded, with consideration of the Medical-Vocational  
22 Guidelines and the assistance of the VE, that plaintiff could perform other jobs existing in

01 significant levels in the national economy, such as work as a cleaner, hospital cleaner, and  
02 dishwasher. The ALJ, therefore, concluded plaintiff was not disabled at any time since the  
03 April 27, 2011 application date.

04 This Court's review of the final decision is limited to whether the decision is in  
05 accordance with the law and the findings supported by substantial evidence in the record as a  
06 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
07 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
08 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
09 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
10 supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
11 F.3d 947, 954 (9th Cir. 2002).

12 Plaintiff argues the ALJ failed to properly consider the opinions of the State agency  
13 medical consultants and requests remand for further administrative proceedings. The  
14 Commissioner maintains the ALJ's decision has the support of substantial evidence and should  
15 be affirmed.

#### 16 State Agency Medical Consultants

17 Dr. Jan Lewis, in May 2011, assessed plaintiff as not significantly limited in relation to  
18 short and simple instructions and decisions, moderately limited in most other respects, and  
19 markedly limited in his ability to carry out detailed instructions and to interact appropriately  
20 with the general public. (AR 56-58.) In the narrative explanations of her findings, Dr. Lewis  
21 noted plaintiff's cognitive functioning was grossly intact on exam, that his severe depression  
22 and anxiety would interfere with his ability to perform complex tasks, and that he is

01 consistently noted as tearful on examination, with quite limited activities of daily living and  
02 poor grooming noted. (AR 57.) Dr. Lewis found plaintiff too anxious to work with the  
03 public, and stated: “[t]earful (would distract coworkers)”, while noting a September 2010  
04 record describing plaintiff as having good eye contact and cooperative. (AR 58.) Dr. Lewis  
05 also, in relation to moderate or no limitations assessed in adaptation, stated: “Indecisive. Can  
06 be ‘frozen’ at times but can adapt when he calms down. Would be overwhelmed in a  
07 fast-paced environment but can function and adapt within a slow-paced routine.” (*Id.*)

08 Dr. Vincent Gollogly, in August 2011, assessed almost identical limitations. (AR  
09 67-69.) Dr. Gollogly also retained the narrative explanations of Dr. Lewis, while adding, in  
10 relation to concentration and persistence: “His [symptoms] may wax and wane but he is  
11 capable of maintaining attention performing [simple repetitive tasks].” (AR 68.) He also  
12 added in relation to social interaction: “Would do best working on his own.” (*Id.*)

13 Plaintiff notes the ALJ’s assignment of “great weight” to the opinions of Drs. Lewis and  
14 Gollogly. (AR 17.) He contends the RFC assessed by the ALJ conflicted with the opinions of  
15 these physicians in failing to include any limitations in his ability to deal with coworkers and  
16 the need to work alone, in allowing him occasional contact with the general public, and in  
17 failing to include a limitation to a slow-paced work environment. He argues reversible error in  
18 the failure to give any reasons for the rejection of these opinions. *See* 20 C.F.R. § 927(e) (ALJ  
19 must consider and explain the weight afforded to opinions of State agency consultants); Social  
20 Security Ruling (SSR) 96-6p (same); SSR 96-8p (“If the RFC assessment conflicts with an  
21 opinion from a medical source, the adjudicator must explain why the opinion was not  
22 adopted.”); *Sawyer v. Astrue*, No. 07-35078, 2008 U.S. App. LEXIS 27247 at \*2-3 (9th Cir.

01 Dec. 12, 2008) (finding ALJ failed to consider findings of state agency consultants “because he  
02 was mistaken as to what their findings were.”; “Although the ALJ noted that he agreed with the  
03 limitations assessed by the state agency consultants, his RFC assessment did not accurately  
04 include the limitations found . . . and his decision did not otherwise explain the weight he gave  
05 these opinions.”) Plaintiff asserts this error impacted the ALJ’s step five conclusion given the  
06 absence of any such limitations in the RFC and hypothetical question proffered to the VE, and  
07 points to medical evidence of record as supporting the limitations in question. (*See* Dkt. 10 at  
08 5-6.)

09 In assigning great weight to the opinions of Drs. Lewis and Gollogly, the ALJ described  
10 their opinions that plaintiff could maintain attention and perform simple, repetitive tasks and, in  
11 regard to social functioning, was moderately limited, but would perform best working on his  
12 own. (AR 17.) The ALJ found these opinions consistent with the objective medical  
13 evidence, including mental status examinations and treatment notes indicating plaintiff’s  
14 symptoms are stable/improve with medications. (*Id.*) He also found the opinions to correlate  
15 with plaintiff’s range of activities, “strongly indicating [plaintiff’s] mental condition does not  
16 preclude unskilled work (e.g. uses public transportation, shops in stores, uses a computer for  
17 social networking, volunteer work at museum and interaction with the public).” (*Id.*) He  
18 further found the opinions to support the mental RFC finding plaintiff “capable of performing  
19 unskilled work with occasional public contact.” (*Id.*)

20 The ALJ had also earlier discussed the opinions of Drs. Lewis and Gollogly at step  
21 three. (AR 12-13.) As the Commissioner observes, the Court properly considers the ALJ’s  
22 decision as a whole, not solely the consideration of the opinion evidence from Drs. Lewis and

01 Gollogly at step four. *See Rice v. Barnhart*, 384 F.3d 363, 370 n.5 (7th Cir. 2004) (“Because it  
02 is proper to read the ALJ’s decision as a whole, and because it would be a needless formality to  
03 have the ALJ repeat substantially similar factual analyses at both steps three and five, we  
04 consider the ALJ’s treatment of the record evidence in support of both his conclusions at steps  
05 three and five.”) (internal citation omitted). Indeed, “[e]ven when an agency ‘explains its  
06 decision with “less than ideal clarity,”” we must uphold it ‘if the agency’s path may reasonably  
07 be discerned.’” *Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (quoted sources  
08 omitted). *See also Magallanes*, 881 F.2d at 755 (“As a reviewing court, we are not deprived of  
09 our faculties for drawing specific and legitimate inferences from the ALJ’s opinion.”).

10 In this case, the ALJ directly addressed the opinions of Drs. Lewis and Gollogly as  
11 related to plaintiff’s ability to interact with the public and coworkers at step three. (AR 12.)  
12 Although inaccurately describing these physicians to have assessed moderate limitations in  
13 these areas, as opposed to marked, the ALJ provided an explanation for his rejection of the  
14 opinions that plaintiff was “‘too anxious to work with the public’ and ‘would do best working  
15 on his own’”, stating: “However, the claimant testified that he volunteers at a museum three  
16 days per week, for a couple of hours, ‘waiting on customers and running cash register.’  
17 Although he added that on some days, he does not go in because of anxiety and depression.”  
18 (*Id.*) The ALJ also later found plaintiff’s current work at the museum, operating as a cashier  
19 and waiting on customers, “inconsistent with allegations of debilitating depression and  
20 anxiety/panic attacks, inability to leave the house or interact socially, or inability to  
21 concentrate/focus.” (AR 16.) He concluded plaintiff’s “range of activities strongly indicate”  
22 his capability of “performing unskilled work limited to simple tasks/instructions and only

01 occasional contact with the public.” (*Id.*)

02       The ALJ did, therefore, properly address and provide reasons for rejecting the degree of  
03 social limitation opined by Drs. Lewis and Gollogly by pointing to evidence inconsistent with  
04 their opinions. *See, e.g., Morgan v. Commissioner of the SSA*, 169 F.3d 595, 601-02 (9th Cir.  
05 1999) (ALJ provided sufficient reasons for discounting marked and other limitations assessed  
06 by physician with contrary evidence of claimant’s activities and abilities). *See also*  
07 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (inconsistency with the record  
08 properly considered in rejection of physician’s opinions); *Rollins v. Massanari*, 261 F.3d 853,  
09 856 (9th Cir. 2001) (affirming an ALJ’s rejection of a treating physician’s opinion that was  
10 inconsistent with the claimant’s level of activity). To the extent plaintiff suggests a contrary  
11 interpretation of the evidence of his work and other activities, he fails to demonstrate the ALJ’s  
12 interpretation was not equally rational. *Morgan*, 169 F.3d at 599 (“Where the evidence is  
13 susceptible to more than one rational interpretation, it is the ALJ’s conclusion that must be  
14 upheld.”) (citing *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995)). It should also be  
15 observed that the ALJ did limit plaintiff to only occasional interaction with the general public,  
16 and that both Drs. Lewis and Gollogly assessed only moderate limitations in relation to  
17 coworkers, with Dr. Gollogly’s additional narrative explanation qualified in stating plaintiff  
18 would “do best” working on his own. (AR 58, 68.) *Cf. Turner v. Comm’r of Soc. Sec.*, 613  
19 F.3d 1217, 1223 (9th Cir 2010) (ALJ need not provide reason for rejecting physician’s opinions  
20 where ALJ incorporated opinions into RFC; ALJ incorporated opinions by assessing RFC  
21 limitations “entirely consistent” with limitations assessed by physician).

22       The ALJ also indicated his consideration of concentration, persistence, and pace at step



three. (AR 13.) Pointing to plaintiff's testimony as to difficulties with memory, concentration/attention, and completing tasks, he stated: "However, the claimant indicated the ability to complete a range of tasks and activities including fixing his own meals, taking the bus, shopping in stores, using a computer to check Facebook, attending appointments and following the course of treatment[.] He testified that he volunteers at a museum three days a week for a couple of hours a day." (*Id.*) The ALJ observed that Drs. Lewis and Gollogly concluded plaintiff's depression and anxiety would interfere with his ability to perform complex tasks, "however, as his symptoms 'may wax and wane' he is 'capable of maintaining attention performing simple, repetitive tasks.'" (*Id.*)

The ALJ did not, however, at either step three or step four directly address the opinion: "Indecisive. Can be 'frozen' at times but can adapt when he calms down. Would be overwhelmed in a fast-paced environment but can function and adapt within a slow-paced routine." (AR 58, 69.)<sup>2</sup> Nor did the ALJ include or address any limitation in relation to pace in either the RFC or the hypothetical proffered to the VE. (*See* AR 13-14, 46-47.) The ALJ, instead, assessed plaintiff as able to maintain concentration, persistence, and pace in an ordinary work setting on a regular and continuing basis, and relied on VE testimony corresponding to that assessment. (AR 13-14, 19, 46-47.)

The Court, as such, agrees with plaintiff's contention that the ALJ erred in failing to

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<sup>2</sup> The physicians included this opinion in the narrative explanation for the moderate adaptation limitations assessed in plaintiff's ability to respond appropriately to changes in a work setting or to set realistic goals or make plans independently of others. (AR 58, 69.) An ALJ properly utilizes the narrative portion of the forms completed by the State agency consultants. *See* Program Operations Manual System (POMS) DI 25020.010 at B.1. *See also* *Warre v. Comm'r of Social Sec. Admin.*, 439 F.3d 1001, 1005 (9th Cir. 2006) (Although the POMS "does not have the force of law" it "is persuasive authority.").

01 address or provide any reasons for rejecting the opinions of Drs. Lewis and Gollogly that  
 02 plaintiff would be overwhelmed in a fast-paced environment, but could function and adapt  
 03 within a slow-paced routine. *See* SSR 96-8p.<sup>3</sup> The Court further agrees this error implicates  
 04 the ALJ's decision at step five. *Lewis v. Apfel*, 236 F.3d 503, 517-18 (9th Cir. 2001)  
 05 ("Hypothetical questions asked of the vocational expert must 'set out all of the claimant's  
 06 impairments.' If the record does not support the assumptions in the hypothetical, the  
 07 vocational expert's opinion has no evidentiary value.") (quoting *Gamer v. Secretary of Health*  
 08 *and Human Servs.*, 815 F.2d 1275, 1278, 1279 (9th Cir. 1987)).

09 Finally, while an error may be deemed harmless where it is "inconsequential to the  
 10 ultimate nondisability determination[.]" *Molina*, 674 F.3d at 1115, the Commissioner fails to  
 11 identify and the Court does not find support in the record for the conclusion that the outcome of  
 12 this case would not be altered through the inclusion of the above-described pace limitation in  
 13 the RFC and VE hypothetical. There is, for example, no testimony from the VE or clear  
 14 indication from a review of the Dictionary of Occupational Titles (DOT) that the jobs identified  
 15 at step five would not be precluded by a limitation to work providing for a slow-paced routine.  
 16 *See* DOT 323.687-014 (cleaner), 323.687-010 (hospital cleaner), and 318.687-010

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17 3 "[A]n ALJ's assessment of a claimant adequately captures restrictions related to  
 18 concentration, persistence, or pace where the assessment is consistent with restrictions identified in the  
 19 medical testimony." *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1173-75 (9th Cir. 2008). While, in  
 20 *Stubbs-Danielson*, the Ninth Circuit found no error in the failure to include an assessed pace limitation  
 21 in the RFC, the facts of that case appear distinguishable. *See id.* (finding ALJ properly translated pace  
 22 and other limitations identified into "the only concrete restrictions available to him", where a physician,  
 while identifying "a slow pace, both in thinking & actions" and other moderate limitations, "ultimately  
 concluded [the claimant] retained the ability to 'carry out simple tasks as evidenced by her ability to do  
 housework, shopping, work on hobbies, cooking and reading.'"; also noting the ALJ's rejection of VE  
 testimony "that a person with anything more than a mild limitation with respect to pace would be  
 precluded from employment except in a sheltered workshop," given his conclusion that assessment did  
 not address the assessed RFC "and did not appear to be based on her individual record as a whole.")

01 (dishwasher). For this reason, and for the reasons stated above, the Court finds this matter  
02 should be remanded for further consideration of the opinions of Drs. Lewis and Gollogly as  
03 related to pace, and, as needed, for further consideration of the RFC assessment and conclusion  
04 at step five.

05 CONCLUSION

06 This matter should be REMANDED for further administrative proceedings.

07 DATED this 26th day of June, 2014.

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10 Mary Alice Theiler  
11 Chief United States Magistrate Judge  
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